Commonwealth of Massachusetts

Supreme Judicial Court

Plymouth, SS

Supreme Judicial Court
F.A.R. No. 26004

Appeals Court
No. 2016-P-1542

Commonwealth

v.

Stanley Fredericq

Defendant-Appellant's Application For Further Appellate Review Of A Decision Of The Appeals Court

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May 11, 2018

Request To Obtain Further Appellate Review

The Defendant-Appellant, Stanley Fredericq ("Fredericq"), applies, pursuant to Mass. R. App. P. 27.1, for leave to obtain further appellate review of the Massachusetts Appeals Court's full opinion issued on March 12, 2018 and published at 93 Mass. App. Ct. 19. (Ex. 1-11). [1]

Statement of Prior Proceedings

On April 22, 2008, a Plymouth Grand Jury returned one indictment charging the defendant, Stanley Fredericq, with trafficking in a controlled substance, cocaine, in excess of 200 grams, in violation of G.L. c. 94C § 32E(b). On March 31, 2009, the defendant filed a motion to suppress the physical evidence seized pursuant to a warrantless search at his residence at 220 Howard Street in Brockton on June 8, 2008. Following a July 15, 2009 evidentiary hearing, the motion was denied in a decision docketed September 3, 2009, on the grounds that the defendant had consented to the search of his residence (Walker, J.).

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[1] The exhibits, reproduced post, will be cited as "Ex. __," the March 9, 2012 Motion to Suppress Hearing transcripts shall be cited "2012 Mot. Tr. I. __ ,"and "2012 Mot. Tr. II. __ ."

Represented by different counsel, Fredericq filed an amended motion to suppress alleging that the consent search was the fruit of an earlier unlawful search of the defendant's cell phone. The motion was initially denied without a hearing (Walker, J.), but following a petition to the Single Justice, pursuant to Mass. R. Crim. P. 15(b), the decision was vacated and the case remanded to the Superior Court for an evidentiary hearing on the motion, and for the findings to be reported back to the Single Justice, who had retained jurisdiction of the matter (Lenk, J.) Pursuant to the order, an evidentiary hearing was conducted on March 9, 2012, and the hearing judge issued written findings of fact and conclusions of law and again denied the defendant's motion (Gaziano, J.). This decision then was reported to the Single Justice, and the defendant again petitioned for review of it. The Single Justice subsequently vacated this decision and remanded the matter to the Superior Court for further evidentiary proceedings in light of Commonwealth v. Augustine, 467 Mass. 230 (2014) and Commonwealth v. Moody, 466 Mass. 196 (2013), and Riley v. California, 134 S.Ct. 2473 (2014)(Lenk, J.).

A further evidentiary hearing was conducted in the Brockton Superior Court on June 24, 2015, and in a decision dated October 26, 2015, the defendant's motion to suppress was allowed (McGuire, J.) The Commonwealth sought interlocutory appeal, which was allowed (Lenk, J.), and the case entered on the Appeal Court's docket on November 18, 2016.

In a March 12, 2018 decision the Appeals Court reversed the trial Court's order suppressing the cocaine, but affirmed the trial Court's order as to the suppression of all other items (Ex. 1-11).

Statement of Relevant Facts

The defendant supplements the facts found by the Appeals Court as follows:

When the police began pinging the targeted cell phone, they expected to find it in New York, but it appeared to be *en route* to Florida instead (2012 Mot. Tr. I. 14). The police then coordinated their ping results with law enforcement officials in Florida who reported making observations of Fredericq and other suspects. Id. at 15-18. The police were then also able to learn about the hotel they were staying at and the make, description, and registration number of the vehicle they were traveling in. Id. at 19.

The Detective investigating the murder, Detective Williams ("Williams"), spoke with Trooper Eric Telford ("Telford") who had separate information from an informant that someone "was going down in a Toyota rental vehicle to Florida and coming back with a large amount of narcotics" (2009 Mot. Tr. I. 118-119). Telford had not used this informant before and did not have any basis to find the informant reliable, but upon learning of Williams' investigation, Telford stated "the information converged at that time" and that the otherwise-bland information by an informant became real. Id. Although the information provided by the informant was "bland," Telford believed that "his information got verified from Detective Williams' investigation, so the information he gave me was then verified by the Florida authorities and his pinging of his - of the phone." Id. at 119-120. Telford remained in contact with Williams as he continued to monitor the pings because Telford wanted to know exactly where the vehicle was located and in advance of its anticipated return to Brockton. When the pings showed the vehicle about to enter Brockton, Telford and other Troopers organized to "try and converge on it." Id. at 120-121. Telford went to 220 Howard Street at 2:15 pm

because the last ping was "Claremont and Howard," which was the intersection where the defendant's apartment building was located. Id at 122.

At the motion to suppress hearing in 2009, first floor resident of 220 Howard street Josette Rawls testified. She lived with her family in the 1st floor apartment for a number of years and recognized the defendant as the person on the 3rd floor (2009 Mot. Tr. I. 166-168). She explained that the 2nd and 3rd floor were one apartment and that the landlord, Jean Blanc also lived in that apartment (Id. and 2009 Mot. Tr. II. 5). There were two apartments in the building, and each apartment had its own main entrance from the street that she described as the left and right entrances. Id. Her apartment had a back door that led to a stairway, that also led to a door to the parking lot in the rear of the building. Id. If one went up the rear stairs one would get to the 2nd floor apartment, and the 3rd floor was also had direct access to the stairway through a door.[2] She stated she had no right to access the 3rd floor, and she did not store any items there. Id. at 176. She rarely ascended the

[2] This was in direct contradiction to the testimony of a police witness who claimed there was no door separating the 3rd floor from the rear staircase.

rear stairway, and if so it was to the 2nd floor to see her landlord. Id. Lastly, she did not have access from her apartment to the main entrance for the 2nd and 3rd floor apartment (2009 Mot. Tr. II. 7-14).

Points With Respect To Which Further Appellate Review Is Sought

I. Whether the Appeals Court erred in reversing the suppression order as to the cocaine on the grounds that it was discovered in a location where the defendant had no expectation of privacy, where the government's unlawful conduct tainted the discovery of the cocaine notwithstanding the specific space within the building in which it was located, where the Appeals Court's characterization of the crawlspace in the defendant's apartment the cocaine was discovered in as a common area is incorrect, and where these grounds for reversal were not raised by the Commonwealth on Appeal or in the Trial Court, or in any of the numerous proceedings on interlocutory appeal.

Reasons Further Appellate Review is Appropriate

I. The Trial Court's order suppressing the cocaine should be affirmed because the Appeals Court's independent finding that the defendant lacked an expectation of privacy in the crawlspace where the cocaine was discovered is unsupported by the evidence and is incorrect, and the government's unlawful conduct in obtaining the defendant's physical location tainted law enforcement's conduct in connection with the defendant's residence such that it did not matter where in the building the cocaine was discovered for suppression purposes.

The Appeals Court found that "because a warrant for the particular evidence from the cellular telephone registered to the defendant was required but not obtained, the 'crucial question' regarding whether the evidence must be suppressed as tainted fruit is whether it came 'by exploitation of … [the illegal search] or instead by means sufficiently distinguishable to be purged of the primary taint.'" Commonwealth v. Fredericq, 93 Mass. App. Ct. at 28 (citations omitted). It also rejected the Commonwealth's argument that the evidence obtained at the defendant's residence was attenuated from its unlawful tracking of the defendant:

> The Commonwealth argues that the defendant's statements and the subsequent discovery of the evidence are admissible because they were attenuated from the initial illegal search of the CSLI. We disagree for the reasons stated in Commonwealth v. Estabrook. … Insofar as the

> defendant is concerned, his statement and his consent to search, given "in direct response to confrontation with evidence of his CSLI[,] were made in close proximity to the illegality, and there were no intervening circumstances between the police questions based on the CSLI and [the defendant's] responses thereto." The defendant's statements therefore must be suppressed. "[T]he connection between the illegality and the granting of consent was 'sufficiently intimate' that the consent cannot be found to have been so attenuated from the [exploitation of the CSLI] as to be purged from its taint." Id. at 17-19 (citations omitted).

However, the Appeals Court independently found that "the cocaine was found in a pillowcase in that attic crawl space" and that "the crawl space was within this common area in a multiunit building" such that there was "no reasonable expectation of privacy in items left there" Id. at 19. "[T]he police were permitted to search the crawl space without the defendant's consent and without a warrant" such that suppression of the cocaine was not required. Id. at 20.

A. It did not matter where in the building the cocaine was discovered as law enforcement's unlawful tracking of the defendant's physical location to his residence contemporaneously with is return to it from Florida tainted all law enforcement discoveries that day in connection with the defendant's apartment building.

In determining whether an unlawful search or seizure requires the suppression of items discovered as a result thereof, a reviewing Court must determine

whether the evidence was obtained through "exploitation of [that] illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Commonwealth v. Damiano, 444 Mass. 444, 453 (2005) (quotations omitted). "[I]nfection will be held to have occurred when the illegality of the police behavior is sufficiently grave and the connection between the illegality and [discovery of the evidence] is sufficiently intimate." Id. at 453-454 (quotations and citations omitted).

The Trial Court correctly applied this law and found that the search of Fredericq's residence and his purported consent were "sufficiently intimate" to law enforcement's unlawful conduct such that the Commonwealth could not meet its burden of establishing attenuation. Telford had only "bland" information from an unreliable informant about a drug trafficking operation, and it was only when he learned of the information Williams had become aware of that "the two investigations came together." Using the unlawfully obtained location information, they had police in other states conduct visual surveillance of their targets. This surveillance provided Brockton officials with identification information about their

suspects as well as their vehicle. Believing that narcotics were being trafficked from Florida, they monitored the ping data until it appeared to be approaching Brockton. Along with the State Troopers, Brockton Police organized to "descend" upon the target vehicle as soon as it arrived in Brockton.

The police were not doing any surveillance on the defendant's residence at 220 Howard Street at any point; they only went there after the defendant's arrival because the intersection outside of the residence was the location of the last ping. All police conduct relative to the defendant and his apartment building on July 8, 2008 resulted from their exploitation of the illegally obtained location information. Every investigative decision was driven by information gained through the unlawful tracking of the defendant. This unlawful tracking was done for days, and law enforcement officials planned in advance to intercept the vehicle upon its immediate arrival in Brockton to search it for narcotics, and they acted on this plan within minutes of the defendant's arrival home. Where the search was conducted at that address, at that time, with the assistance of a narcotics detecting canine, the unlawful conduct of the police

was "sufficiently intimate" to the search that resulted in the discovery of cocaine. Commonwealth v. Gentile, 466 Mass. 817, 831-832 (2014).

The Appeals Court finding that the cocaine need not be suppressed because the defendant lacked an expectation of privacy in what it characterized as a "common area" in which the cocaine was discovered, is wrong as it is irrelevant where the cocaine was specifically discovered. The police presence at the defendant's apartment building on that date and time altogether was tainted by their unlawful conduct such that it should not have mattered whether they discovered the cocaine in the vehicle, on someone's person as they were carrying the narcotics from the vehicle in the open view to building, or anywhere in the building. Due to the breadth of their unlawful conduct, they simply could not lawfully take any action towards the defendant or his residence.

The case of Commonwealth v. Lahti, is particularly illustrative of this point. 398 Mass. 829, 832-837 (1986). There, as a result of an unlawful interrogation, the identity of previously unknown victims of sexual abuse was learned. Upon contact with the victims, the police obtained their

testimony in support of charges against the defendant. This Court however, suppressed this voluntary testimony as the product of the unlawful police interrogation. Id. at 836-837.

Likewise, in the present case, whether Fredericq had an expectation of privacy in the crawlspace outside of his bedroom is irrelevant to the question as to whether the cocaine should be suppressed. Telford's investigative interest in searching for narcotics on July 8, 2008 at the defendant's residence was, in its entirety, the product of the unlawfully obtained location information. Consequently, all activities relative to the building in which the defendant resided were taken as a result of their exploitation of the illegality, such that it does not matter what specific location within the building the cocaine was discovered in. The cocaine should be suppressed as ordered by the trial court.

B. The Appeals Court characterization of the crawlspace outside of the defendant's bedroom as part of common area is incorrect as it was part of the defendant's apartment part of the tenant shared common space, such that Fredericq had an expectation of privacy in the crawlspace and the bag the cocaine was discovered in.

Although not suggested by the Commonwealth at any time, and not raised at oral argument, the Appeals

Court found on its own initiative, that the crawlspace where the cocaine was hidden was a common area in which the defendant lacked an expectation of privacy. Commonwealth v. Fredericq, 93 Mass. App. Ct. at 30-31. It reasoned that because the defendant lacked an expectation of privacy in that crawlspace, suppression of the cocaine was unnecessary. Id.

The Appeals Court finding is erroneous. The description of the layout of the apartment relied upon by the Appeals Court was testified to by police witnesses and contradicted in part by the longtime resident of the 1st floor apartment. She testified that the 2nd and 3rd floor were one unit[3], and that her landlord also lived in that apartment. Her only access to the 3rd floor was a rear stairway and there was a door to the 3rd floor there. As a 1st floor tenant, she was not permitted access upstairs nor was she allowed to use any space upstairs for storage.

The Appeals Court suggestion that the space outside the defendant's bedroom was a truly common area in large multi-family buildings that was essentially under the landlord's control and to which

[3] This explains the absence of a bathroom on the 3rd floor that was noted by the Appeals Court. Commonwealth v. Fredericq, 93 Mass. App. Ct. at 25.

all people coming through the building had access to is wrong. The only evidence to support the characterization advanced by the Appeals Court is premised on an incomplete description of the physical layout of part of the apartment offered by police officers who had been there briefly, and even that evidence was contradicted by the 1st floor tenant. There was no evidence as to usage of the space by the tenants or landlord that would support the contention that it was a common area, and the tenant who testified as to the usage of the space stated that she did not have unfettered access to the upstairs apartment nor was she permitted to access it.

With this evidence, it is clear that the area outside of the defendant's bedroom was space as to which he had an expectation of privacy. Commonwealth v. Hall, 366 Mass. 790, 794 (1975). Indeed, the defendant's bag - characterized as a pillowcase - being present in his apartment, was something he also independently had an expectation of privacy in, much like guest's expectation of privacy in their bags even at someone's else's home. Commonwealth v. Magri, 462 Mass. 360 (2012) (overnight guest's bags not subject to search simply because in plain view).

The record does support the Appeals Court finding that the crawlspace was a common area as to which the defendant had no expectation of privacy because it was a private space inside of a private residence. The record is inadequate to support the Appeals Court contention because it's factually inaccurate and inconsistent with the testimony of the 1st floor resident whose testimony conflicted with that of the police officer with limited knowledge of the space at issue and the rights of the building's occupants to use the space within it. The record was not developed below to support the Appeals Court finding because no party sought to advance that argument made by the Appeal Court and consequently, did not develop the factual record necessary to support the Appeals Court's finding. This Court should address this serious error by the Appeals Court and allow further appellate review.

C. The grounds relied upon by the Appeals Court to reverse the suppression order should have been deemed waived.

Despite this matter having multiple evidentiary hearings in the Superior Court and proceedings on interlocutory appeal, at no point has the Commonwealth ever advanced the argument that the defendant lacked

an expectation of privacy in the crawlspace outside of his bedroom. Had the argument been raised by the Commonwealth, it should have been deemed waived pursuant to Mass. R. App. P. 16(a)(4). The Appeals Court however ruled on these grounds on its own initiative with total surprise to the defendant as the issue had never been raised below, not been briefed, and not raised at oral argument by the Court. It should have been treated as waived as it had never been raised below and reversing the suppression order on ground as to which the defendant had no notice violates his due process rights under the United States Constitution and the Massachusetts Declaration of Rights.

Conclusion

This case has had a lengthy history, having been before the single justice on two occasions before proceeding to the Appeals Court. There have been multiple evidentiary hearings in this matter and there have been hearings on the merits of the defendant's suppression claims by numerous Superior Court justices. The Appeals Court's decision reversing the suppression order on grounds never raised below by any party was based on erroneous grounds, and is irreconcilable with other decisions of this Court and the Appeals Court in other cases. For the reasons stated above, this Court should correct the serious errors of law committed by the Appeals Court and allow further appellate review.

Respectfully Submitted,

Stanley Fredericq

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Dated: May 11, 2018

Exhibits

1. Appeals Court Full Opinion,
   March 12, 2018 Pages 1-11

Commonwealth v. Fredericq, 93 Mass. App. Ct. 19

Appeals Court of Massachusetts

December 1, 2017, Argued; March 12, 2018, Decided

No. 16-P-1542.

Reporter

93 Mass. App. Ct. 19 * | 2018 Mass. App. LEXIS 29 **

COMMONWEALTH *vs.* **STANLEY FREDERICQ.** 1

Prior History: [**1] Plymouth. INDICTMENTS found and returned in the Superior Court Depart- **[*20]** ment on August 22, 2008.

A pretrial motion to suppress evidence was heard by *Thomas J. McGuire, Jr.*, J.

An application for leave to prosecute an interlocutory appeal was allowed by *Barbara A. Lenk*, J., in the Supreme Judicial Court for the county of Suffolk, and the appeal was reported by her to the Appeals Court.

Core Terms

cellular telephone, suppress, door, telephone, carrier, attic, cell, records, cocaine, crawl space, illegality, homicide, privacy, exploitation, apartment, tracking, tainted, towers, spoke, ping, attenuated, cellular, arrived, signal, registration, subscriber, narcotics, traveling, searched, bedroom

Case Summary

Overview

HOLDINGS: [1]-Defendant had standing under Mass. Const. Decl. Rights art. XIV and U.S. Const. amend. IV and XIV to file a motion to suppress evidence obtained as a result of a warrantless search of cellular telephone information because he was the owner of the cellular phone, even if another was using it, and he had a reasonable expectation of privacy not to be subject to six days of extended tracking; [2]-Defendant's motion to suppress was properly granted as to his statements and as to money found in his room because defendant's consent to search was tainted by the police exploitation of the illegally obtained information that it was not admissible; [3]-The cocaine found in the crawl space should not have been suppressed because the police did not need defendant's consent to search the space that was accessible to all tenants.

Outcome

Order reversed in part and affirmed in part.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN1 **Clearly Erroneous Review, Motions to Suppress**
In reviewing a judge's ruling on a motion to suppress, an appellate court accepts the judge's subsidiary findings of fact absent clear error but conducts an independent review of his ultimate findings and conclusions of law. More like this Headnote

Shepardize - Narrow by this Headnote

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

Criminal Law & Procedure > Search & Seizure > Standing

HN2 **Search & Seizure, Scope of Protection**
Where a defendant claims the search of the cellular telephone violated his rights under Mass. Const. Decl. Rights art. XIV and U.S. Const. amends. IV and XIV, an appellate court must determine initially whether the defendant has standing to contest the search and then whether he had an expectation of privacy in the area searched. Although the two concepts are interrelated, a court

considers them separately. A defendant has standing either if he has a possessory interest in the place searched or in the property seized or if he was present when the search occurred. More like this Headnote

Shepardize - Narrow by this Headnote

Criminal Law & Procedure > Search & Seizure > Expectation of Privacy

HN3 **Search & Seizure, Expectation of Privacy**
If a defendant has no reasonable expectation of privacy in space searched, he cannot challenge the police action that occurred there. More like this Headnote

Shepardize - Narrow by this Headnote

Headnotes/Syllabus

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Cellular Telephone > *Controlled Substances* > *Constitutional Law* > Search and seizure > Standing > Privacy > Probable cause > *Search and Seizure* > Consent > Expectation of privacy > Fruits of illegal search > Multiple occupancy building > Probable cause > Warrant > *Privacy* > *Probable Cause* > *Consent* > *Evidence* > Result of illegal search > Business record > *Practice, Criminal* > Motion to suppress > Standing > Warrant

A Superior Court judge properly allowed a criminal defendant's pretrial motion to suppress statements he made to police and cash that was discovered during a search of his bedroom that was conducted following the use by police of cell site location information (CSLI), obtained without a warrant, under an order pursuant to 18 U.S.C. § 2703, for a cellular telephone registered to the defendant, where, given that the defendant was the registered owner of the cellular telephone and the billing address was his, the defendant had a possessory interest in the cellular telephone sufficient to grant him standing to challenge the validity of the search (which was a search in the constitutional sense, in that the defendant had a reasonable expectation not to be subjected to extended CSLI tracking by the government) [26-27]; and where, particularly in light of the nature of the CSLI (i.e., it was not routinely created or retained by the carrier), the defendant's statement and his consent to search were given in direct response to confrontation with evidence of his CSLI and were made in close proximity to the illegality with no intervening circumstances between the police questions based on the CSLI and the defendant's responses thereto [27-30]; however, the defendant was not entitled to suppression of narcotics discovered during the search of a crawl space located off a common area of the multiple unit residence in which the defendant's bedroom was located, where police required neither the defendant's consent nor a warrant to search an area in which the defendant lacked a reasonable expectation of privacy [30-31]; finally, this court stated that the affidavit accompanying the application for the order pursuant to 18 U.S.C. § 2703 was bereft of the factual details required to establish probable cause [31-32].

Counsel: *Nathaniel Kennedy*, Assistant District Attorney, for the Commonwealth.

Jason Benzaken for the defendant.

Judges: Present: AGNES, BLAKE, & MCDONOUGH, JJ.

Opinion by: BLAKE

Opinion

BLAKE, J. As a result of information gathered in connection with a homicide, an interstate narcotics investigation began, which led police to discover cocaine and cash at 220-222 Howard Street in the city of Brockton.[2] This is an interlocutory appeal by the Commonwealth from the order allowing the defendant's motion to suppress evidence obtained as a result of a warrantless search. We reverse in part and affirm in part.

We set forth detailed facts and the procedural history of this case as they are necessary to the analysis. The defendant was indicted [**2] for trafficking in 200 grams or more of cocaine. He has twice filed motions to suppress. In his first motion, the defendant argued that the search at 220 Howard Street was conducted without a warrant and without his consent. After a two-day evidentiary hearing, the first motion judge denied the motion on grounds that the defendant consented to the search. In the defendant's second, or so-called "amended" motion to suppress, he argued that the evidence seized from 220 Howard Street must be suppressed as the tainted fruit of the unlawfully obtained cellular site location information (CSLI).[3] The same judge denied the motion after a nonevidentiary hearing and the defendant sought interlocutory review.

[*21] A single justice of the Supreme Judicial Court, while retaining jurisdiction of the case, ordered an evidentiary hearing on the motion. After the evidentiary hearing, a second motion judge denied the motion, concluding that the defendant lacked standing as he had no reasonable expectation of privacy in the cellular telephone. Following receipt of the trial court decision and the issuance of several appellate decisions involving the police use of CSLI, the single justice again remanded [**3] the case to for further consideration in light of *Commonwealth* v. *Augustine*, 467 Mass. 230, 4 N.E.3d 846 (2014), and *Commonwealth* v. *Moody*, 466 Mass. 196, 993 N.E.2d 715 (2013), as well as *Riley* v. *California*, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014).

Thereafter, a third motion judge held a hearing at which no additional evidence was presented, but the transcripts from the previous hearings were submitted together with additional briefs from the parties. The third motion judge concluded that the defendant had standing. He also reasoned that because the police seized the cocaine "by exploiting the unlawful electronic tracking through CSLI," and because "[t]he search and seizure was not attenuated from the" illegal conduct, the motion must be allowed. The Commonwealth's application for leave to appeal from that order was granted and the case was entered in this court.

Background. The findings of fact made by each of the three motion judges are consistent and are not in dispute on appeal. We summarize the findings relevant to the issues raised in this appeal, supplemented where necessary with undisputed evidence that was implicitly credited by the particular judge ruling on the motion. See *Commonwealth* v. *Jones-Pannell*, 472 Mass. 429, 431, 35 N.E.3d 357 (2015).

On June 8, 2008, there was a shooting that resulted in the death of Bensney Toussaint. A few days later, on June 10, 2008, police officers obtained an arrest warrant for Josener Dorisca. [**4] Dorisca, for all relevant time periods relating to this matter, was a fugitive from justice. On June 26, 2008, an indictment was returned against Dorisca, charging him with murder.

During the homicide investigation, Detective Kenneth Williams of the Brockton police department identified Cassio Vertil[4] as Dorisca's best friend. Detective Williams spoke to Cassio; he was not cooperative, but he gave the detective his cellular telephone number. Detective Williams obtained the cellular telephone **[*22]** records for the number provided by Cassio, which showed that "Bill Desops" was the subscriber. The records also showed that telephone calls were made within moments of the shooting to a cellular telephone number that police identified as belonging to Dorisca. Thereafter,

Detective Williams spoke to Cassio again, but was unsuccessful in eliciting information about the nature of those telephone calls or Dorisca's location. During the interview, Detective Williams recognized Cassio from a videotape that he had seen.[5]

As the second judge found, that videotape, recorded several months before the homicide, captured Cassio, "a person named Rinaldi Lauradin, and others flashing large sums of money and [**5] discussing the movement of drugs from Florida to Massachusetts." A gun could also be seen in the footage. Detective Williams testified that "the tape clearly displays [Cassio] and other members engaged in what seems to be very lucrative drug dealings... . And bragging and boasting of going to Florida to obtain more drugs. And they're flashing tens of thousands of dollars on this tape."

About one month after the homicide, Detective Williams spoke to Cassio's brother, Kennell. Kennell reported that Cassio was now using a different cellular telephone number, and that Cassio was on his way to New York with "Paco" and "Paquito." Further investigation revealed that Paco was the defendant and Paquito was Stevenson Allonce. After speaking with Kennell, the Commonwealth sought and obtained an order pursuant to 18 U.S.C. § 2703(d) (2006) requiring the cellular telephone carrier to provide the records and the so-called "running location" of that different telephone, going forward, to assist in finding Dorisca and to investigate Cassio.[6] The carrier was required to provide Detective Williams with the cellular telephone's location every fifteen minutes prospectively. The carrier "pinged" the telephone at fifteen-minute [**6] intervals, an action that is not routinely under- **[*23]** taken by cellular telephone carriers.[7] The defense expert explained that the "ping" sends a communication signal to the cellular telephone and requires the cellular telephone to communicate with the nearby cell tower. See generally *Commonwealth* v. *Augustine*, 467 Mass. at 237-238. The carrier can identify the location of the cell tower by coordinates of longitude and latitude. The carrier then sends, in this case to Detective Williams, this information and the maximum distance the cellular telephone can be from that cell tower, based on the strength and location of nearby cell towers.

The CSLI records showed that the defendant, not Desops, was the subscriber of the cellular telephone that Cassio was then using. The billing address on those records was 220-222 Howard Street, apartment 2. The records also reflected that the defendant had yet another cellular telephone number.

State police Trooper Eric Telford assisted in the homicide investigation. He knocked on doors, spoke to family members, and tried to obtain information about individuals close to Dorisca. On the evening of July 2, 2008, Trooper Telford was contacted by a confidential informant. The informant [**7] told Trooper Telford that Cassio was headed to Florida in a brown Toyota RAV4 sport utility vehicle (SUV) rental to pick up a large quantity of narcotics. As a result, Trooper Telford thought that Dorisca may intend to hide out in Florida.

From July 2 to July 8, 2008, Detective Williams confirmed, through CSLI data, that Cassio, Allonce, and the defendant made a trip to Florida. The CSLI data also showed that the cellular telephone was traveling south toward Florida and came to a stop in Sunrise, Florida. When the signal was stationary in Sunrise, Detective Williams contacted the local police. Using the CSLI data, the Sunrise police found a brown Toyota, with a Massachusetts registration, and through additional surveillance and communication with Massachusetts police, identified Cassio, Allonce, and the defendant as the three individuals using the Toyota. On **[*24]** July 7, 2008, the CSLI data indicated that the cellular telephone was moving north. When the telephone was shut off for a period of time during the trip, Detective Williams could not track it.

On July 8, 2008, Detective Williams again began receiving CSLI information as the Toyota approached the Massachusetts border. He alerted the [**8] Brockton and the Randolph[8] police that the Toyota was returning to the area. At 2:15 P.M., Detective Williams was notified that the telephone pinged at or near Howard Street. Trooper Telford and State police Trooper Francis Walls, together with other officers, arrived at 220 Howard Street shortly after this ping was received.

Trooper Telford observed Cassio standing in front of the Howard Street building with an individual who matched Dorisca's description. He watched Cassio and the other individual get into the Toyota and drive away. Troopers Telford and Walls followed. When the driver made a left turn without using a directional signal, the troopers stopped the Toyota. The driver was identified as Cassio and the passenger was identified as Allonce, not Dorisca. The two stated that the defendant had been traveling with them, that they had just come from his house, and that they were going to the Brockton police department to speak to Detective Williams about the homicide. The Toyota was filled with clothing, luggage, a pillow, a cooler, and other items. Trooper Telford had the two occupants step out of the Toyota so they could check for Dorisca. When Trooper Telford confirmed Dorisca [**9] was not hiding in the Toyota, he permitted Cassio and Allonce to continue on their way. Ping data that Detective Williams received showed that the cellular telephone came to rest near the Brockton police station at about 3:45 P.M. on July 8, 2008.

Troopers Telford and Walls returned to 220 Howard Street to look for Dorisca, to find and speak to the defendant, and to investigate the possible drug connection to the property. Trooper Telford directed other officers to that location to assist him. When Troopers Telford, Walls, and Jackson arrived, they

approached a man on the front porch. As Trooper Walls began to speak to him, a female and a male came out of the first-floor apartment. While Trooper Telford walked around to the rear of the house, Trooper Walls explained to the couple that the police were looking for a homicide suspect and that they thought that he might be inside their apartment. The couple agreed to allow both troopers inside **[*25]** and walked them through every room of their apartment. The troopers were taken through the back door to the exit, which opened into a common rear entry area. There was a door to the outside from that common area, as well as stairs to the second and [**10] third floors.

Troopers Walls and Jackson used the rear stairs to go to the second-floor apartment, where the occupant of that apartment met them in the hallway. They repeated their request and were again granted permission to look for Dorisca in that apartment. Finding nothing, both troopers continued to the attic. At the top of the stairs there was a large open landing area, without any door. Off of the landing area, there were four doors, which led to two bedrooms, a storage area, and a crawl space. The only way to secure the attic would be to lock the entry door located in the common area on the first floor. Three of the four doors in the attic were open and the troopers looked in each space. A television was in the front bedroom, and junk was piled in the storage room. There was no bathroom or shower on this floor.

The troopers knocked on the closed, fourth door several times before the defendant opened it and came into the landing area. They asked the defendant his name and, when he told them, they asked if he had a nickname; he said it was Paco. Because Trooper Walls knew Paco was a name related to the drug investigation Trooper Telford was working on, he contacted Trooper Telford [**11] and asked him to come up to the attic. In the meantime, Troopers Jackson and Walls explained that they were looking for Dorisca. They obtained the defendant's verbal permission to do a quick walk-through of the defendant's room, which turned up nothing significant. The defendant said he lived there and was paying $400 in rent per month.

Trooper Telford, who had been outside, walked through the rear entry door to the common hallway and came up the back stairs to the attic. Trooper Telford read the defendant the Miranda rights and explained to him why the troopers were there. The defendant said that he had gone to Florida with his friends to attend a family reunion for Allonce. The defendant denied having any drugs in his room and signed a consent to search form.

During the subsequent search, police found about $2,200 in a cupboard in the defendant's bedroom. After a narcotics-trained dog arrived in the attic, police located a pillowcase in the crawl space that contained about two kilograms of what police believed to be cocaine. That pillowcase matched a pillowcase found in the Toyota. The defendant denied any knowledge of the contraband.

[*26] Based on this evidence, the third motion judge ruled [**12] that the defendant had standing to challenge the search because the tracking continued while the police searched 220 Howard Street. The judge also determined that the defendant's reasonable expectation of privacy under art. 14 of the Massachusetts Declaration of Rights was violated where the police tracked his "movements for seven days through the collection of CSLI obtained from a cell phone registered to him but used by [another]." With respect to the search, the judge agreed with the Commonwealth that no warrant was required to obtain subscriber information from the carrier. However, the judge determined that under *Commonwealth* v. *Augustine*, 467 Mass. at 257, the failure of the Commonwealth to acquire a warrant for the CSLI rendered that evidence illegally obtained. The judge found that because the police learned, only through the unlawful CSLI, that the cocaine was likely brought to Howard Street, their seizure of the cocaine was the result of "exploiting the unlawful electronic tracking through CSLI." The judge further found that "[t]he search and seizure was not attenuated" from the illegality and thus "[t]he evidence obtained during that search must therefore be suppressed."

Discussion. ***HN1*** In reviewing a judge's ruling on a motion to suppress, "we accept the judge's subsidiary findings [**13] of fact absent clear error 'but conduct an independent review of his ultimate findings and conclusions of law.'" *Commonwealth* v. *Scott*, 440 Mass. 642, 646, 801 N.E.2d 233 (2004), quoting from *Commonwealth* v. *Jimenez*, 438 Mass. 213, 218, 780 N.E.2d 2 (2002).

1. *Standing.* On appeal, the Commonwealth does not dispute that the CSLI was illegally obtained. Rather, the Commonwealth argues that the defendant does not have standing to challenge the search of the cellular telephone.

HN2 Where a defendant claims the search of the cellular telephone violated his rights under art. 14 and the Fourth and Fourteenth Amendments to the United States Constitution, we must determine initially whether the defendant has "standing to contest the search and then whether [he] had an expectation of privacy in the area searched." *Commonwealth* v. *Williams*, 453 Mass. 203, 207-208, 900 N.E.2d 871 (2009). "Although the two concepts are interrelated, we consider them separately... . A defendant has standing either if [he] has a possessory interest in the place searched or in the property seized or if [he] was present when the search occurred." *Id.* at 208. Here, regardless of whether the defendant allowed Cassio to use the cellular telephone, because the defendant was **[*27]** the registered owner of the telephone and the billing address was his, he had a possessory interest in the telephone sufficient to grant him standing. He also had standing because his movements were [**14]

being tracked when the telephone was pinged by the carrier during the trip he took with Cassio to Florida.

There also was a search in the constitutional sense. The defendant has a reasonable expectation not to be subjected to extended CSLI tracking by the government, even if he is merely a passenger in a vehicle controlled by the primary suspect. The government's monitoring of the defendant's movements — for more than six days — is sufficient to establish that he has standing to challenge the validity of the search of the cellular telephone. *Commonwealth* v. *Rousseau*, 465 Mass. 372, 382, 990 N.E.2d 543 (2013). 9

2. *Exclusionary rule*. The Commonwealth argues alternatively, that the CSLI information was so attenuated from the seizure of the inculpatory evidence that suppression is not required. Specifically, the Commonwealth argues that the evidence subsequently seized from the Howard Street attic ought not to be excluded because it is too attenuated from the illegality. The Commonwealth's concession is based on *Augustine*, where the court held that government-compelled production of CSLI data by cellular telephone carriers is a search in the constitutional sense, requiring a warrant under art. 14. *Commonwealth* v. *Augustine*, 467 Mass. at 252-255.

We pause to note that the CSLI ordered to [**15] be produced in *Augustine* involved historical CSLI, which was generated from telephone calls already made to or from the cellular telephone in question. The related records, which show the cell towers from which connection to telephone calls were made, and through which the locus of the cellular telephone's location can be pinpointed, are maintained by the carrier in the ordinary course of business. *Id.* at 239-240 & n.24. The § 2703(d) order obtained in this case required the carrier to create CSLI that was not routinely created or retained. That is, the carrier was required to prospectively ping a cellular telephone every fifteen minutes for more **[*28]** than six days, solely for the purpose of finding and providing location information for the police. There is no question that under the rationale of *Augustine*, a warrant was also required in this case, where the carrier not only was compelled to turn over CSLI data, but to create particular prospective CSLI that it otherwise would not have created. See *id.* at 240 n.24 ("The privacy interest raised by historical CSLI may be the same as prospective, or 'real-time,' CSLI").

Because a warrant for the particular evidence from the cellular telephone registered to the defendant [**16] was required but not obtained, the "crucial question" regarding whether the evidence must be suppressed as tainted fruit is whether it came "by exploitation of ... [the illegal search] or instead by means sufficiently distinguishable to be purged of the primary taint." *Commonwealth* v. *Estabrook*, 472 Mass. 852, 860, 38 N.E.3d 231 (2015) (citation omitted). See *Commonwealth* v. *Bradshaw*, 385 Mass. 244, 258, 431 N.E.2d 880 (1982), citing *Wong Sun* v. *United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Relying on these principles, we consider the evidence at issue.

In this case, the troopers first spoke to the defendant when he responded to their repeated knocking by opening the only closed door in the attic and entering the landing area. 10 After the defendant gave permission to Troopers Walls and Jackson to do a quick walk-through of his room for Dorisca, Trooper Telford arrived and spoke to the defendant. He read the defendant the Miranda rights and then "explained to him that [they] were there searching for [Dorisca], who was a homicide suspect, and that **[*29]** [they] also had information that he, and Mr. Azario [*sic*], and the other defendant there, Allonce, had just gone down to Florida and purchased a large amount of narcotics and they were possibly storing it there." This statement was based directly on the tainted CSLI and while it was intertwined with other independent evidence, [**17] the inquiry exploited the improperly obtained CSLI. *Commonwealth* v. *Estabrook*, *supra* at 864-865.

Specifically, the police knew from a somewhat dated videotape that existed prior to the CSLI that Cassio had traveled to Florida to buy large amounts of narcotics. In addition, they had statements from Kennell that Cassio was traveling to New York with the defendant and Allonce. They also had statements from an informant (who Trooper Telford had not previously used) that Cassio (without reference to any other individuals) was going to Florida to buy narcotics in a brown Toyota. They also knew from Kennell that Cassio was using a cellular telephone number that was registered to the defendant and was billed to 220 Howard Street. The CSLI, however, provided the only direct and reliable evidence that the defendant had "just" participated in a trip to Florida. Indeed, Massachusetts authorities used the CSLI to direct police in Sunrise, Florida, to the location where the cellular telephone came to rest, and from where, through surveillance, identification details from the Toyota and its occupants were relayed back.

The Commonwealth argues that the defendant's statements and the subsequent discovery of the evidence [**18] are admissible because they were attenuated from the initial illegal search of the CSLI. We disagree for the reasons stated in *Commonwealth* v. *Estabrook*, *supra*. The defendant was not confronted with any question based on his CSLI until he spoke with Trooper Telford, after the defendant answered the knock on his attic room door. Indeed, when Trooper Telford confronted the defendant with evidence of this tainted CSLI, including that the information that the defendant had just returned from Florida, there is no evidence that the defendant was aware that the police knew he had traveled to Florida. Insofar as the defendant is concerned, his statement and his consent to search, given "in direct response to confrontation with evidence of his CSLI[,] were made in close proximity to the illegality, and

there were no intervening circumstances between the police questions based on the CSLI and [the defendant's] **[*30]** responses thereto." [11] *Ibid.* The defendant's statements therefore must be suppressed. "[T]he connection between the illegality and the granting of consent was 'sufficiently intimate' that the consent cannot be found to have been so attenuated from the [exploitation of the CSLI] as to be purged from its [**19] taint." *Commonwealth* v. *Gentile*, 466 Mass. 817, 831, 2 N.E.3d 873 (2014).

As for the cash found in the cupboard in the defendant's bedroom, there is certainly some question that the defendant was not being truthful when he said the room was his home, particularly given the lack of a bathroom or a shower. Nonetheless, the defendant kept it locked and he was inside when the police arrived. For the reasons discussed *supra*, we conclude that the defendant's consent to search was tainted by the police exploitation of the illegally obtained CSLI and therefore, his statement to police before the search and the cash found in his bedroom must be suppressed.

With respect to the search of the crawl space, however, the defendant's consent was not required. The facts regarding the access to, use, and layout of the attic were carefully developed during the evidentiary hearings. The crawl space was accessible to any tenant by entering through the ground level exterior door in the rear of the dwelling, which was apparently left unlocked, and walking up the stairs to the attic. There, off of the main landing, were several rooms or areas with open doors, including the crawl space. Items found in the rooms with open doors suggested [**20] that tenants stored or disposed of possessions they did not need or want in that location. The cocaine was found in a pillowcase in that attic crawl space. Because the crawl space was within this common area in a multiunit building, there is no reasonable expectation of privacy in items left there. See *Commonwealth* v. *Thomas*, 358 Mass. 771, 774-775, 267 N.E.2d 489 (1971); *Commonwealth* v. *Montanez*, 410 Mass. 290, 302, 571 N.E.2d 1372 (1991); *Commonwealth* v. *Holley*, 79 Mass. App. Ct. 542, 551-552, 947 N.E.2d 606 (2011). See also *Commonwealth* v. *Connolly*, 356 Mass. 617, 624, 255 N.E.2d 191, cert. denied, 400 U.S. 843, 91 S. Ct. 87, 27 L. Ed. 2d 79 (1970) ("Since the basement was a common area freely available to all the tenants, one tenant could give permission to its search"). As a matter of law, the police were permitted **[*31]** to search the crawl space without the defendant's consent and without a warrant. See, e.g., *Commonwealth* v. *Williams*, 453 Mass. at 209 (***HN3*** Because defendant had no reasonable expectation of privacy in space searched, he "cannot challenge the police action that occurred there"). The cocaine therefore, need not be suppressed.

We address one outstanding issue. When this case was remanded in 2015 by the single justice, it was with the instruction to consider the defendant's motion to suppress in light of several recently decided cases, specifically *Augustine*. Despite this instruction, neither the Commonwealth nor the third motion judge addressed that portion of *Augustine* in which the court considered whether the § 2703(d) application [**21] provided probable cause to obtain the CSLI, in which case the failure to seek a warrant to obtain CSLI would not require suppression of that evidence. *Commonwealth* v. *Augustine*, 467 Mass. at 255-256. Nor did the Commonwealth raise the issue in its brief on appeal, although the matter was briefly touched on at oral argument, over the defendant's objection. Because of the lengthy and somewhat unusual procedural posture of this case and the specific instruction from the single justice to consider *Augustine*, we address the issue in the interest of judicial economy. See *Commonwealth* v. *Beale*, 434 Mass. 1024, 1024 n.1, 751 N.E.2d 845 (2001).

Here, the only detailed statement in Detective Williams's affidavit accompanying the § 2703(d) application for the CSLI states: "The current and recent location of Cassio Vertil is necessary and important to my investigation because other witnesses and obtained phone records indicate that Cassio Vertil has been, and continues to provide aid and support to the indicted Josener Dorisca." The statement fails to identify the witnesses and does not identify the requisite basis for assessing their reliability or their veracity. See *Commonwealth* v. *Burt*, 393 Mass. 703, 710, 473 N.E.2d 683 (1985) (discussing various kinds of informers and witnesses). Similarly, the particular "phone records" are not identified and Detective Williams did not articulate [**22] how those records reveal that Cassio provided aid and support to Dorisca. Contrast, e.g., *Commonwealth* v. *Lopes*, 455 Mass. 147, 164-165, 914 N.E.2d 78 (2009). This conclusory statement is so bereft of the factual details required to establish probable cause that, unlike the situation presented in *Augustine*, we need not remand the matter to the trial court for further findings. See, e.g., *Commonwealth* v. *Moran*, 353 Mass. 166, 169-170, 228 N.E.2d 827 (1967) (distinguishing between facts and conclu- **[*32]** sions).

Conclusion. So much of the order as allowed the defendant's motion to suppress with respect to the cocaine is reversed. In all other respects, the order is affirmed.

So ordered.

Footnotes

1 In conformity with our practice, we spell the defendant's name as it appears in the indictment.

2 The building at this location consists of a multifamily dwelling and has an address of 220-222 Howard Street, with the numbers denoting two different doors at the front of the residence. Because the witnesses primarily referred to the building as 220 Howard Street, we will do so here.

3 CSLI "is a record of a subscriber's cellular telephone's communication with a cellular service provider's base stations (i.e., cell sites or cell towers) ... ; this identifies the approximate location of the 'active cellular telephone handset within [the cellular service provider's] network based on the handset's communication with a particular cell site.'" *Commonwealth* v. *Estabrook*, 472 Mass. 852, 853 n.2, 38 N.E.3d 231 (2015), quoting from *Commonwealth* v. *Augustine*, 467 Mass. 230, 238, 4 N.E.3d 846 (2014), *S.C.*, 470 Mass. 837, 26 N.E.3d 709 (2015). It also identifies the subscriber of the cellular telephone number.

4 As Cassio Vertil shares a surname with another witness, his brother, Kennell Vertil, see *infra*, we use their first names to avoid confusion.

5 The videotape was admitted in evidence at the suppression hearing.

6 The motion, the affidavit, and the § 2703(d) order were admitted as an exhibit at the hearing. The second motion judge referred in some detail to the facts recited by Detective Williams; however, neither party has included a copy of the exhibit in the record appendix for us to determine whether the judge properly recited the facts therein. Accordingly, we exercised our discretion and obtained the exhibit sua sponte. See Mass.R.A.P. 9(b), as amended, 378 Mass. 935 (1979); Mass.R.A.P. 18(a), as amended, 425 Mass. 1602 (1997). Cf. *Iverson* v. *Board of Appeals of Dedham*, 14 Mass. App. Ct. 951, 951-952, 437 N.E.2d 572 (1982).

7 A cellular telephone will regularly send a signal to nearby cell towers or cell sites to insure that service is maintained. *Commonwealth* v. *Augustine*, 467 Mass. at 237-240. There is a second type of "historical CSLI" identified in *Augustine* as "registration CSLI" but that type was neither at issue in *Augustine*, nor is it at issue in this case. *Id.* at 238 n.18. Registration CSLI is

created when cellular telephones "regularly identify themselves to the nearest cell site with the strongest signal, through a process known as 'registration.' Registration is automatic, occurring every seven seconds." *Ibid.*

8 Cassio lived in Randolph.

9 The second motion judge, who denied the suppression motion on grounds that the defendant lacked standing because he had no reasonable expectation of privacy in the cellular telephone, did not have the benefit of *Rousseau* which was subsequently decided. *Rousseau* addressed, for the first time, privacy expectations of a passenger in a motor vehicle when the driver is being monitored by the government.

10 Contrary to the defendant's claim on appeal, the arrival of the police at 220 Howard Street did not result from exploiting the CSLI. Troopers Telford and Walls had stopped the Toyota when it failed to signal before turning. Regardless of whether the police were in a position to observe the traffic infraction because of the illegally obtained CSLI, "the stop is valid 'so long as the police are doing no more than they are legally permitted and objectively authorized to do.'" *Commonwealth* v. *Santana*, 420 Mass. 205, 209, 649 N.E.2d 717 (1995) (citation omitted). See *Commonwealth* v. *Buckley*, 478 Mass. 861, 866-867 (2018) (Examining "police's underlying motives for conducting the stop" would "require that courts discern not only whether the police initially possessed some underlying motive that failed to align with the legal justification for their actions, but also whether the police were acting on that 'improper' motive"). Here, the police observed a traffic infraction and were permitted to stop the vehicle. See *Commonwealth* v. *Bacon*, 381 Mass. 642, 644, 411 N.E.2d 772 (1980).

The police established a sound basis to return to 220 Howard Street to speak with the defendant once they identified Cassio and Allonce in the Toyota, and Cassio confirmed the information independently acquired from the CSLI.

11 Although the third motion judge did not specifically reference the defendant's statements when he ordered suppression of the evidence obtained during the search, he concluded by allowing "[t]he defendant's Amended Motion to Suppress Evidence II," which included a request to suppress the defendant's statements.

Content Type: Cases

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Commonwealth of Massachusetts

Supreme Judicial Court

Plymouth, SS

Supreme Judicial Court
F.A.R. No. 26004

Appeals Court
No. 2016-P-1542

Commonwealth

v.

Stanley Frederico

Certificate of Service

I, Jason Benzaken, Esq., hereby certify that I have served counsel for the Commonwealth, Plymouth County District Attorney's Office, 166 Main Street, Brockton, Massachusetts 02301 with a copy the Petitioner-Appellant's Application for Further Appellate Review by electronic mail on this date, May 11, 2018.

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